

# INTERPRETATION DILEMMA: PAYMENT RESPONSE IN CIPAA 2012

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*To my beloved family members  
for their endless love, care and support.....*

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## **ABSTRACT**

By virtue of section 6(4) of the CIPAA 2012, the entire amount is deemed disputed if the non-paying party chooses not to respond to the payment claim. Hence, the non-paying party will not be precluded from challenging the payment claim in the adjudication proceeding even if he has failed to serve a payment response. The stand taken by section 6(4) is conflicting to the jurisdiction of the adjudicator as set out in subsection 27(1), where any dispute is limited to the matter referred to by the parties pursuant to sections 5 and 6. In contrast with the deeming provision provided under section 6(4), the decided CIPAA cases has proven that the interpretation of section 6(4) is rigid and failure to submit payment response will cause the later defence and/or counter-claim in the adjudication response to be estopped. In the application of statutory interpretation, it is critical to note that irrespective of any perspective, it is trite that court must give effect to the statute according to the intent of Parliament. This research intended to identify the proper interpretation of section 6(4) of CIPAA. In achieving the objective of this research, in depth study would be made to understand the application of payment response in other statutory adjudication jurisdictions, the intention of the Parliament and the principle of statutory interpretation, namely the literal, golden and mischief rule (known also as the purposive approach). From the findings, it is pertinent to note that the crux behind the introduction of statutory adjudication exclusively to ensure timely, consistent and prompt payment. Despite section 25 of CIPAA empowers wide ranging authorities to the adjudicator, however an absurdity cannot be the intent of Parliament as the limit of the adjudicator is governed by subsection 27(1) of CIPAA, which clearly circumscribes under payment claim and payment response. As the current CIPAA is adequate to serve the intention of the Parliament, therefore it is highly recommended for section 6(4) to be amended to avoid any ambiguity.

## **ABSTRAK**

Menurut seksyen 6(4) CIPAA 2012, seluruh jumlah disifatkan sebagai dipertikaikan jika pihak yang tidak membayar memilih untuk tidak memberikan respons kepada tuntutan pembayaran. Maka, pihak yang tidak membayar tidak akan dihalang dari mencabar tuntutan pembayaran dalam prosiding adjudikasi sekalipun telah gagal untuk menyampaikan suatu respons pembayaran. Pendirian diambil oleh seksyen 6(4) bercanggah dengan bidang kuasa adjudicator yang tertakluk kepada subseksyen 27(1), di mana sebarang pertikaian adalah terhad kepada perkara yang dirujukkan oleh pihak-pihak menurut seksyen 5 dan 6. Berbeza dengan peruntukan di bawah seksyen 6(4) yang sedia ada, kes-kes CIPAA telah membuktikan bahawa tafsiran seksyen 6(4) adalah tegar dan kegagalan mengemukakan respons pembayaran akan menyebabkan sebarang pembelaan dan / atau tuntutan balas dalam respons adjudikasi tersebut ditolak. Dalam mentafsir aplikasi undang-undang, adalah kritikal untuk mengambil kira dari setiap sudut perspektif, bahawa undang-undang lapuk telah menetapkan mahkamah untuk mengkehendaki tafsiran suatu akta berdasarkan niat Parlimen. Kajian ini berniat mengenal pasti tafsiran yang sesuai di bawah seksyen 6(4) CIPAA. Dalam mencapai objektif kajian ini, pemahaman secara mendalam dikehendaki bagi memahami pengaplikasian respons pembayaran di dalam bidang kuasa adjudikasi berkanun yang lain, niat Parlimen dan prinsip pentafsiran undang-undang, iaitu kaedah harafiah, keemasan dan kemudharatan (juga dikenali sebagai kaedah tujuan). Adalah dikenali pasti bahawa adjudikasi berkanun secara eksklusif dipertuntukan untuk memastikan pembayaran yang tetap, cepat dan tepat pada masanya. Walaupun seksyen 25 CIPAA memberikan kuasa yang luas kepada adjudikator, namun adalah satu kemustahilan bagi Parlimen untuk berniat sedemikian kerana kuasa adjudikator yang diterhadkan telah tertakluk di bawah subseksyen 27(1) CIPAA, yang dengan jelas menghadkan peruntukan pertikaian hanya melalui tuntutan pembayaran dan respons pembayaran. Oleh kerana tafsiran CIPAA memadai untuk menzahirkan niat Parlimen, adalah disarankan untuk seksyen 6(4) dipinda untuk menghindari apa-apa kemusykilan.

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## **LIST OF ABBREVIATIONS**

AC	Law Reports: Appeal Cases
All ER	All England Law Reports
AMR	All Malaysia Reports
BLR	Building Law Report
Ch	Chancery Law Reports
Ch D	Chancery Division Law Report
CLJ	Current Law Journal (Malaysia)
CLR	Commonwealth Law Reports
Const LR	Construction Law Reports
EWCA	England and Wales High Court
EWHC	High Court of England and Wales Decisions
LJQB	Law Journal Queen Bench
LR	Law Reports
MLJ	Malayan Law Journal
MLJU	Malayan Law Journal Unreported
PWD	Public Works Department (Malaysia)
NSWSC	New South Wales Supreme Court
QB	Queen Bench
SCR	Supreme Court Report
SLR	Singapore Law Report
WLR	Weekly Law Report

## LIST OF CASES

*ACFM Engineering & Construction Sdn Bhd v Esstar Vision Sdn Bhd & Another Case (unreported, 21 July 2015)*

*Air Design (Kent) Ltd v. Deerglen (Jersey) Ltd [2008] EWHC 3047 (TCC)*

*Aldoga Aluminium Pty Ltd v De Silva Starr Pty Ltd [2005] NSWSC 284*

*All Malayan Estates Staff Union v Rajasegaran & Ors [2006] 6 MLJ 97*

*Amec Civil Engineering Ltd v Secretary of State for Transport [2004] EWHC 2339*

*American International Amec Projects Ltd v Whitefriars City Estate [2004] EWHC 393 (TCC)*

*American International Assurance Company Ltd v. Koh Yen Bee [2002] 4 CLJ 49 CA*

*AWG v. Rockingham Motorway Speedway Limited [2004] EWHC 888 (TCC)*

*Balfour Beatty Construction Ltd v The Mayor and Burgesses of the London Borough of Lambeth [2002] EWHC 597*

*Bina Puri Construction Sdn Bhd v Hing Nyit Enterprise Sdn Bhd [2015] MLJU 941*

*Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] 1 All ER 810*

*Bluemover One Ltd v The Breen Construction Company Ltd and others* (unreported, 3 July 2007)

*Bovis Lend Lease Ltd v Triangle Development Ltd* [2002] EWHC 3123 (TCC)

*Bovis Lend Lease Ltd v The Trustees of the London Clinic* [2009] EWHC 64 (TCC)

*Brodyn Pty Ltd t/as Time Cost and Quality v Philip Davenport and Anor* [2004] NSWCA 394

*B Hargreaves Ltd v Action 2000 Ltd* (1993) 62 BLR 72

*Carillion Construction Ltd v Devonport Royal Dockyard* [2005] EWHC 778 (TCC)

*Central Bank of India Ltd Amritsar v. Harford Fire Insurance Co Ltd* AIR [1965] SC 1288

*Cheong Seok Leng v Public Prosecutor* [1988] 2 MLJ 481

*Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2010] 1 SLR 658

*Collins (Contractors) Ltd v Baltic Quay Management (1994) Ltd* [2004] 2 All ER 982

*Corkery v Carpenter* [1951] 1 KB 102

*Corocraft Ltd and another v Pan American Airways Inc* [1969] 1 QB 616

*Dawnays Ltd v FG Minter Ltd* [1971] 2 All ER 1389

*Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31

*Duquemin (CA.) v Slater* (1993) 65 B.L.R. 124

*Duport Steels Ltd & Ors v Sirs & Ors* [1980] 1 All ER 529

*Enterprise Managed Services v Tony McFadden Utilities Ltd* [2010] BLR 89

*Fastrack Contractors Ltd v. Morrison Construction Ltd* [2000] BLR 168

*Ferson Contractors Ltd v. Levolux AT Ltd* (2003) 86 Con LR 98 (CA)

*Fisher v Bell* [1961] 1 QB 394

*Gilbery Ash (Northern Ltd) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689

*Grovedeck Limited v Capital Demolition Limited* [2000] BLR 181

*Hazari Tewari v Mt Maktula* AIR [1932] All 30

*Herbosh–Kiere Marine Contractors Ltd v Dover Harbour Board* [2012] EWHC 84 (TCC)

*Heydon's Case* (1584) 3 Co Rep 7

*Jayakumar a/l Rajoo Mohamad v CIMB Aviva Takaful Bhd* [2015] 6 MLJ 437

*Joseph Puspam v Menteri Sumber Manusia, Malaysia & Anor* [2001] 4 CLJ 252

*KNS Industrial Services (Birmingham) Ltd v Sindall Ltd* (unreported, 17 July 2000)



*Kuala Lumpur, Klang & Port Swettenham Omnibus Co Bhd v Transport Workers' Union [1971] 1 MLJ 102*

*Lai Yoke Ngan v Chin Teck Kwee [1997] 2 MLJ 565*

*Lanes Group Plc v Galliford Try Infrastructure T/A Galliford Try Rail [2012] BLR 121*

*Lee Ween Lick Terence (alias Li Weili Terence) v Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) and another appeal [2012] SGCA 63*

*Mackay Ltd v Blyth & Blyth Consulting Engineers Ltd [2013] CSOH 54*

*Manokaram a/l Subramaniam v Ranjid Kaur a/p Nata Singh [2009] 1 MLJ 21*

*Marshall (Inspector of Taxes) v Kerr (unreported, 7 April 1993)*

*Mellows Archital Ltd v. Bell Projects Ltd (1997) 87 BLR 26*

*Mondel v Steel (1841) 8 M&W 858*

*Mudajaya Corporation Berhad v Leighton Contractors (Malaysia) Sdn Bhd [2015]10 MLJ 745*

*Multiplex Constructions Pty Limited v Luikens [2003] NSWSC 1140*

*Nepean Engineering Pty Ltd v Total Process Services Pty Ltd [2005] NSWCA 409*

*Newacres Sdn Bhd v Sri Alam Sdn Bhd [2000] 2 CLJ 833*

*Northern Developments (Cumbria) Ltd v J&J Nichol [2000] BLR 158*

*Nothman v London Borough of Barret [1978] ALL ER 1243*

*Pacific General Securities Ltd & Anor v Soliman & Sons Pty Ltd & Ors [2006] NSWSC 13*

*Parist Holdings Pty Ltd v Wt Partnership Australia Pty Ltd [2003] NSWSC 365*

*Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd [1985] 1 MLJ 157*

*Pembinaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd [1995] 2 CLJ 345*

*Pepper (Inspector of Taxes) v Hart [1993] AC 593*

*Philpott v St George's Hospital (1857) 6 HLC 338*

*Public Prosecutor v Sihabudin bin Hj Salleh & Anor [1980] 2 MLJ 273*

*Re Sigsworth [1935] Ch 89*

*R v Secretary of State for the Environment, Transport and the Regions, Ex Parte Spath Holme Ltd [2001] 2 AC 349*

*R v Maginlis [1987] AC 303*

*Regina v Loosely [2001] UKHL 53*

*SL Timber Systems Ltd v Carillion Construction Ltd [2001] BLR 516*

*Sungdo Engineering & Construction (S) Pte Ltd v Italcor Pte Ltd [2010] SGHC 105*

*Subang Skypark Sdn Bhd v Arcradius Sdn Bhd [2015] 11 MLJ 818*

*St Aubyn & Ors v Attorney-General [1951] 2 All ER 473*

*The Dorchester Hotel Ltd v Vivid Interiors Ltd [2009] BLR 135*

*UDA Holdings Bhd v Bisraya Construction Sdn Bhd & Anor and another case [2015] 11 MLJ 499*

*Vaultise Ltd v Paul Cook (unreported, 6 April 2004)*

*View Esteem Sdn Bhd v Bina Puri Holdings Bhd (2015) MLJU 695*

*VC K Bus Service v HB Sethna AIR [1965] Mad 149*

*Walter Construction v. CPL (Surry Hills) [2003] NSWSC 266*

*Westcourt Corp Sdn Bhd v Tribunal Tuntutan Pembeli Rumah [2006] 1 MLJ 339*

*Westnorth Labour Hire Ltd v SB Properties Ltd (unreported, 19 December 2006)*

*Wilson v First County Trust Ltd [2003] All ER (D) 187*

*WRP Asia Pacific Sdn Bhd v NSBluescope Lysaght Malaysia Sdn Bhd (2015) MLJU 1125*

*W Y Steel Construction Pte Ltd v Osko Pte Ltd [2013] SGCA 32*

## CHAPTER 1

### INTRODUCTION

#### 1.2 Introduction

According to Eleventh Malaysia Plan, Strategy Paper 18,<sup>1</sup> from 2011 to 2014, 29,435 construction projects were awarded at total value of RM470 billion. The contribution of construction industry is highly recognised as it recorded a double digit average annual growth rate of 11.1% during the Tenth Plan. It is undeniable that construction industry generates wealth, improves quality of life and creates work opportunities for many, which indirectly has multiplier effect on each other segments of the Malaysian economy (Azman, M.N.A. *et al.* (2014)).<sup>2</sup> The following are the few noteworthy construction project projected for 2016:<sup>3</sup>

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<sup>1</sup> Eleventh Malaysia Plan. Strategy Paper 18: Transforming Services Sector. (2015). page 71. Retrieved on May 2, 2016 from the Economic Planning Unit, Prime Minister's Department website: <http://rmk11.epu.gov.my/pdf/strategy-paper/Strategy%20Paper%2018.pdf>

<sup>2</sup> Azman, M. N. A., Dzulkalnine, N., Hamid, Z. A., Kamar, K. A. M., & Nawi, M. N. M. 2014. *Payment Scenario in the Malaysian Construction Industry Prior to CIPAA*. Journal Technology. UTM 70:1 (2014) 57-63

<sup>3</sup> Ibid

- (i) Development cost of RM11billion for Cyber City Centre in Cyberjaya
- (ii) Development costs of RM320 million for Rubber City, Kedah, RM142 million for Samalaju Industrial Park and RM200million for Palm Oil Jetty in Sandakan;
- (iii) RM1.4billion to improve 700km of roads throughout the country; and
- (iv) Various schemes such as PRIMA, MESRA, Rakyat, FELDA, RISDA and PPAIM for 351,500 houses and 66 new primary/secondary schools and colleges.

As evidenced, the Government appreciates the significant of construction sector. In reciprocation, the employer must keep his side of the bargain by effecting timely payment to ensure continuing success of this sector.<sup>4</sup> It is submitted that payment is a crucial issue in the construction industry. According to Lord Denning in the English case of *Dawnay Ltd. v. FG Minter Ltd and others*,<sup>5</sup> ‘cash flow is life blood of the construction industry’. Similarly, the Malaysian construction industry also experienced significant numbers of payment disputes. Statistics by Martin, R. (2015)<sup>6</sup> revealed that since the enforcement of statutory adjudication in Malaysia, the total value of all payment claims registered was approximately RM330 million. According to Abidin, A. (2007),<sup>7</sup> payment is in the top list of issues in the construction contracts that are referred to the courts.

It is further submitted that Malaysia is not the only country that is troubled by payment difficulty. It appears that other countries are also not spared by the conundrum. As a respond to this major problem, the British Parliament had in 1996 passed a statute called the Housing Grant, Construction and Regeneration Act (“HGCRA”) as a means

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<sup>4</sup> Singh, H. (2015). *Harbans' Engineering and Construction Contracts: Commencement and Administration*, 2nd Edition, LexisNexis

<sup>5</sup> (1971) 2 All ER 1389

<sup>6</sup> Martin, R. (2015). *Happy Birthday CIPAA!*. Malaysia Society of Adjudicators. Newsletter Issue 3. January-June 2015. Page 21

<sup>7</sup> Asniah Abidin. (2007). *The Profile of Construction Disputes*–M.ScConstruction Contract Management Dissertation, UTM

of speedy determination for construction contract disputes. The success of UK 1996 Act as the first country which made adjudication a statutory summary mechanism to address payment defaults issues has spread to other parts of Commonwealth jurisdictions such as Scotland, Northern Ireland, all states in Australia, New Zealand, Singapore and most recently, Malaysia. The implication of late and non-payment not only cause a serious cash flow problem,<sup>8</sup> but also compel the unpaid party to abandon the project and some were on the brink of bankruptcy (Dancaster, 2008).<sup>9</sup> Unlike other industries, due to the size, duration, complexity and involvement of multiple parties, failure in getting timely payment trigger a chronic and prevalent effect to the entire delivery chain of construction industry (A N Ameer Ali, 2006)<sup>10</sup>. In essence, it entails the idea that the parties to a construction contract should 'pay now, argue later'.<sup>11</sup>

While most standard form contracts offer for interim, progress or stage payments, such as clause 42 CIDB and clause 28 PWD Form 203A (rev. 1/2010), however the completion of the whole project or works is commonly a condition precedent in order to receive payment. Therefore, this aspect of adjudication is both significant and critical as a statutory right to interim payments without waiting for the completion of the whole works.<sup>12</sup> This right was very much embraced in the construction industry because the reality was that both main and sub-contractors depended on interim payments for cash flows, both sustainable and sustained as their lifelines. The various states modelled after the UK 1996 Act are as follows:

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<sup>8</sup> Bernstein, R. (1987). *Handbook of Arbitration Practice*. London: Sweet & Maxwell Ltd.

<sup>9</sup> Dancaster, C. (2008). *Construction Adjudication in the United Kingdom: Past, Present, and Future*. J. Prof. Issues Eng. Educ. Pract, Vol. 134, No. 2, ASCE

<sup>10</sup> Ameer Ali, N.A. (2006, April). *Adjudication, an End to Cash Flow Problems in the Construction Industry*. Kuala Lumpur Regional Centre for Arbitration – Construction Industry Development Board Conference on Adjudication. Kuala Lumpur, Malaysia.

<sup>11</sup> RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland) Ltd [2002] EWCA Civ 270

<sup>12</sup> Richies, J.L., and Dancaster, C. (2004). *Construction Adjudication*. (2nd ed.) Great Britain: Blackwell Publishing.

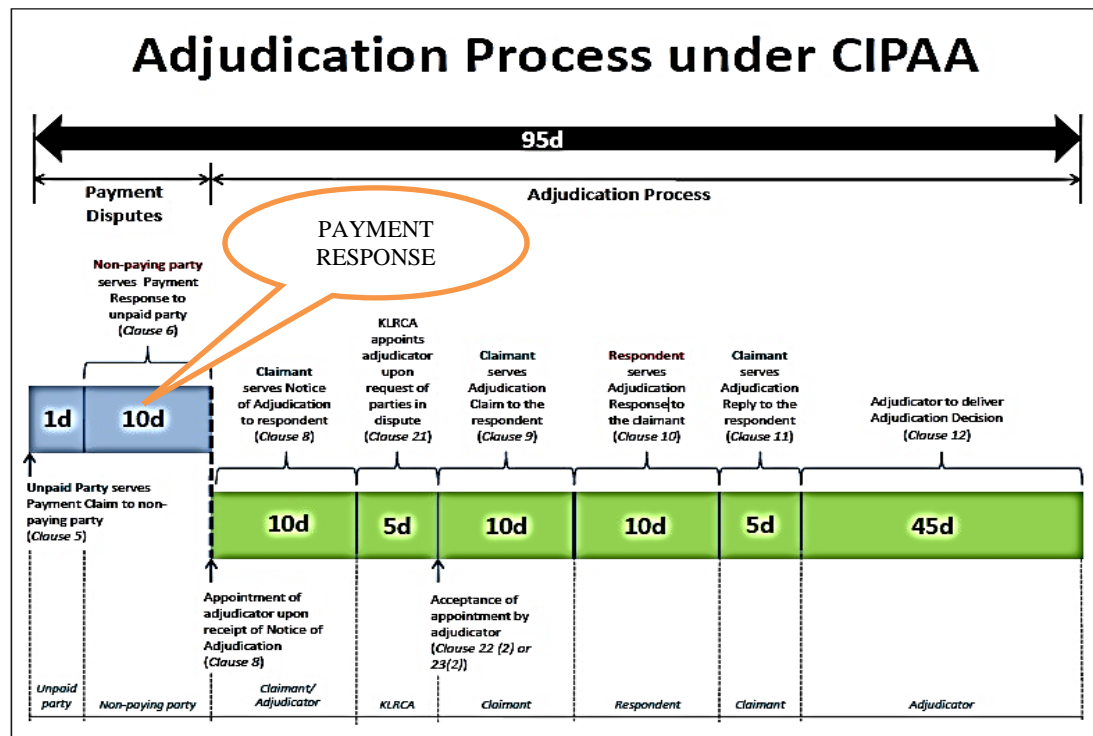
	STATE	LEGISLATION TITLE	EFFECTIVE DATE	FUNCTIONS
1.	New South Wales (“NSW”)	Building and Construction Industry Security of Payment 1999 (amended in 2002)	26.03.2000	Reduce payment delay
2.	Victoria	Building and Construction Industry Security of Payment Act 2002 (amended in 2006)	14.05.2002	Rights to progress payment
3.	New Zealand	Construction Contracts Act 2002	01.04.2003	Speedy resolution, timely payment and provide remedies for non-payment
4.	Queensland	Building and Construction Industry Payments Act 2004	01.07.2004	Rights to progress payment
5.	Western Australia	Construction Contracts Act 2004	01.01.2005	Improving cash flow and timely payment
6.	Singapore	Building and Construction Industry Security of Payment Act 2004	01.04.2005	Expediting payment and improving cash flow
7.	Northern Territory	Construction Contracts (Security of Payments) Act 2004	01.07.2005	Speedy resolution, timely payment and provide remedies for non-payment
8.	Tasmania	The Building and Construction Industry Security of Payment Act 2009	17.12.2009	Reform payment behavior in the industry
9.	Australia Capital Territory	The Building and Construction Industry (Security of Payment) Act 2009	01.07. 2010	Facilitate recovery of payments under construction contracts
10.	South Australia	The Building and Construction Industry Security of Payment Act 2009	10.12.2011	Speedy resolution, timely payment and provide remedies for non-payment
11.	Malaysia	The Construction Industry Payment and Adjudication Act 2012	15.04.2014	Speedy resolution, timely payment and provide remedies for non-payment

**Statutory Adjudication in Other Countries and Functions (Karib, Shaffii, and Nor, 2008)<sup>13</sup>**

<sup>13</sup> Karib, A. S., Shaffii, N., & Nor, N. M. (2008). *A Report on The Proposal for a Malaysian Construction Industry and Adjudication Act (CIPAA)*. Lembaga Pembangunan Industri Pembinaan Malaysia. Retrieved on March 9, 2016 from [https://www.cidb.gov.my/cidbv2/images/pdf/cipaa08\\_0.pdf](https://www.cidb.gov.my/cidbv2/images/pdf/cipaa08_0.pdf)

### 1.2.1 Commencement and Scope of CIPAA

After much debate and discussion involving the relevant governmental bodies, professional organisations and various stakeholders in the industry, the Construction Industry Payment & Adjudication Act 2012 (“CIPAA”) was gazetted by the Malaysian Parliament on 22 June 2012 and finally came into effect on 15 April 2014. Although the Bill took a long time in the making and has been improved prior to the birth, the Act is still not free from criticism. In particular, many are concerns that the outcome of this new legislation would be a claim culture, where the unpaid party would proceed to adjudication on the slightest dispute, causing all time, energy and resources being spent unnecessarily instead of concentrating on concluding the project (Fong, 2012).<sup>14</sup>

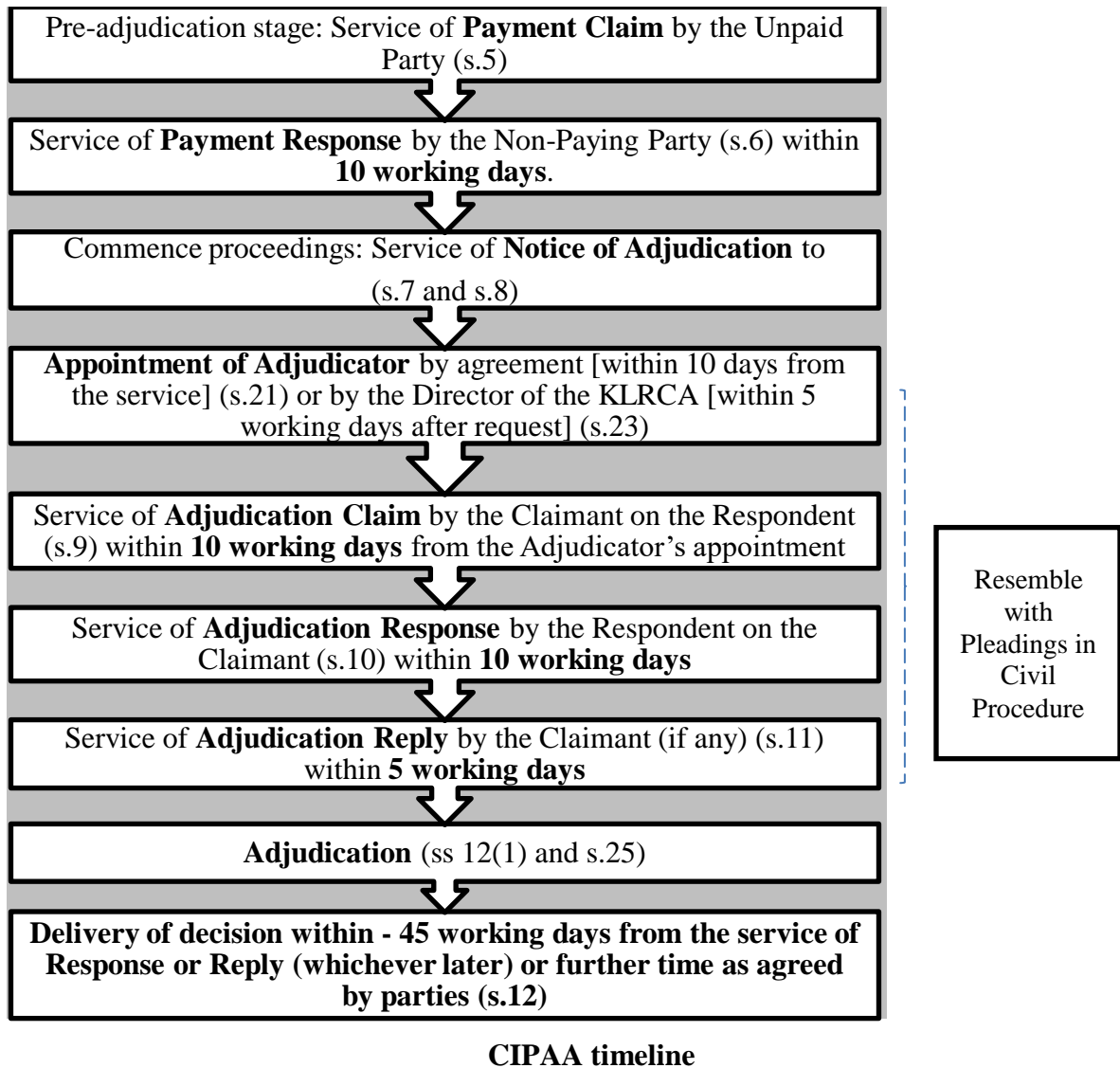


CIPAA Process Flowchart (CIDB)<sup>15</sup>

<sup>14</sup> Fong, L. C. (2012). *The legal implication of CIPAA*. Retrieved on May 10, 2016, from [http://klrca.org.my/userfiles/File/The-Legal-Implication-CIPA-Conference-24\\_10\\_2012.pdf](http://klrca.org.my/userfiles/File/The-Legal-Implication-CIPA-Conference-24_10_2012.pdf)

<sup>15</sup> CIDB. *Adjudication Process Under CIPAA*. Retrieved on May 16, 2016, from <http://www.cidb.gov.my/cidbv4/images/pdf/CIPAflowchart.pdf>





As a prerequisite, an unpaid party who wishes to avail himself to the adjudication process must first serve a payment claim to the non-paying party.<sup>16</sup> The mere service of a payment claim by an unpaid party on the non-paying party does not automatically or immediately give rise to a dispute.<sup>17</sup>

<sup>16</sup> section 5 of the CIPA Act 2012

<sup>17</sup> Collins (Contractors) Ltd v Baltic Quay Management (1994) Ltd [2004] BLR 63

Once the payment response period has expired, written notice of adjudication is served<sup>18</sup> and as soon as the appointment of an adjudicator is concluded, the claimant is required to serve its written adjudication claim.<sup>19</sup> In this respect, the claimant is required to serve its written adjudication claim by specifying the nature, description of the dispute, the remedy sought including any supporting documents on the respondent and the adjudicator within 10 working days from the receipt of the acceptance of the appointment by the adjudicator. The respondent is then obliged to serve its written adjudication response within 10 working days from the receipt of the adjudication claim.<sup>20</sup> Failure to do so would allow the claimant to proceed with the adjudication. Upon receipt of the adjudication response, the claimant may serve its adjudication reply within 5 working days thereof.<sup>21</sup>

Decision to be delivered within 45 working days from the service of the adjudication response or reply, whichever is later, or 45 days from the expiry of the period prescribed for the adjudication response if no adjudication response is provided. The prescribed time-frames may be prolonged, provided with the agreement of the parties. If the adjudication decision is not furnished within the specified time, that decision will be deemed void.<sup>22</sup> The entire procedure from the initiation of adjudication process up to the delivery of the adjudicator's decision will take approximately around 95 to 100 working days.

Despite there is no express provision prohibiting parties from contracting out of the CIPAA, it is obvious that contracting out would be contrary to the public policy and the intention of the Act to alleviate payment problems. It is trite law that freedom to contract is not absolute, instead, it is subject to the statute.<sup>23</sup>

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<sup>18</sup> Section 8 of the CIPA Act 2012

<sup>19</sup> Section 9 of the CIPA Act 2012

<sup>20</sup> Section 10 of the CIPA Act 2012

<sup>21</sup> Section 11 of the CIPA Act 2012

<sup>22</sup> Section 12 of the CIPA Act 2012

<sup>23</sup> American International Assurance Company Ltd v. Koh Yen Bee [2002] 4 CLJ 49 CA

### 1.1.2 CIPAA and the Other Statutory Adjudication Regimes

The pertinent differences between CIPAA and the adaptation of other legislations can be identified, amongst others, are as follows:

- (a) **Scope of dispute:** Unlike United Kingdom where all matters in a dispute under a construction contract to be referred to adjudication, including non-payment issues,<sup>24</sup> the statutory regimes in New South Wales,<sup>25</sup> New Zealand,<sup>26</sup> Singapore<sup>27</sup> and Malaysia mainly govern payment disputes only.
  
- (b) **Written and/or Oral Contract:** Similar to Singapore,<sup>28</sup> the Malaysian statutory adjudication strictly confines to contracts made in writing.<sup>29</sup> Previously, section 107 of the HGCRA is applicable strictly to written construction contract but changes have since been made by Part 8 of the Local Democracy, Economic Development and Construction Act 2009 where the written requirement is now repealed.<sup>30</sup> Australia<sup>31</sup> and New Zealand<sup>32</sup> also followed the footsteps of United Kingdom position and the contract will now relevant to written, oral or a mixture of both.

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<sup>24</sup> Section 108 of the Housing Grants, Construction and Regeneration Act 1996

<sup>25</sup> Section of the Building and Construction Industry Security of Payment Act 1999

<sup>26</sup> Section 3 of the Construction Contracts Act 2002

<sup>27</sup> Section 12 of the Building and Construction Industry Security of Payment Act 2004

<sup>28</sup> Section 4 of the Building and Construction Industry Security of Payment Act 2004

<sup>29</sup> Section 2 of the CIPA Act 2012

<sup>30</sup> Section 139(1) of the Local Democracy, Economic Development and Construction Act 2009.

<sup>31</sup> Section 7(1) of the New South Wales 1999 Act.

<sup>32</sup> Section 9(c) of the Construction Contracts Act 2002.

- (c) **Definition of Construction Work:** Unlike other jurisdictions, ‘gas, oil and petrochemical’ works are not included nor expressly defines under the scope of ‘construction work’ except in CIPAA.<sup>33</sup>
- (d) **Time to Render Decision:** The adjudicator in United Kingdom has 28 days,<sup>34</sup> 20 days in New Zealand,<sup>35</sup> 14 days in Singapore<sup>36</sup> and 10 working days in New South Wales, Australia<sup>37</sup> to render a decision. Unlike other jurisdictions, the adjudicator in Malaysia is expected to deliver his decision within forty five (45) days.<sup>38</sup>
- (e) **Jurisdictional Challenge:** Unlike the Singapore<sup>39</sup> and New South Wales Act, Malaysia took rather unusual approach under section 27(3) of the CIPAA as the adjudicator is permitted not to decide the “jurisdictional challenge” (including the validity of the payment claim and the payment response) but to proceed with and complete the adjudication proceedings despite the jurisdictional challenge.
- (f) **Setting Aside an Adjudication Decision:** Section 15 of CIPAA expressly permits an aggrieved party to submit an application to set aside an adjudication decision at High Court, whereas Singapore, New Zealand and

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<sup>33</sup> Section 4 of the CIPA Act 2012 elaborated that "construction work" means the construction, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling, or demolition of any electrical, including but not limited to mechanical, water, gas, oil, petrochemical or telecommunication work.

<sup>34</sup> Section 19(1) of the Scheme for Construction Contracts (England and Wales) Regulations 1998

<sup>35</sup> Section 46(2) of the Construction Contracts Act 2002

<sup>36</sup> Section 17(1) of the Building and Construction Industry Security of Payment Act 2004

<sup>37</sup> Section 21(3) of the Building and Construction Industry Security of Payment Act 1999

<sup>38</sup> Section 12(2) of the CIPA Act 2012

<sup>39</sup> Section 17 of the Building and Construction Industry Security of Payment Act 2004 or the Building and Construction Industry Security of Payment Act 1999 in New South Wales

New South Wales allow a review procedure where the matter can be reargued before another arbitrator.

- (g) **Retrospective effect:** The retrospective effect in CIPAA is not consistent with other jurisdictions. For instance, section 104(6)(a) of UK 1996 Act affirmed that the applicable dispute under the ambit of adjudication process is for construction contracts which are entered into after the commencement of this Act. Similarly, New Zealand,<sup>40</sup> Australia<sup>41</sup> and Singapore<sup>42</sup> also applicable to contract either entered into on or after the enforcement of the Act.
- (h) **Details in Payment Claim:** The statutory provisions in New South Wales, Singapore and New Zealand merely require the unpaid party to provide details to identify the construction contract to which the progress payment relates, whereas CIPAA<sup>43</sup> requires the unpaid party to provide details which identify the cause of action to which the payment relates.
- (i) **Failure to Respond:** Section 6(3) of the CIPAA identifies that a payment response shall be served on the unpaid party within ten working days of the receipt of the payment claim. However, under section 6(4), “*a non-paying party who fails to respond to a payment claim in the manner provided under this section is deemed to have disputed the entire payment claim*”, hence the non-paying party indirectly preserving the right to defend at later stage in the event a payment response is not served.

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<sup>40</sup> Sections 10 and 11 of the New Zealand Construction Contract Act 2002

<sup>41</sup> Building and Construction Industry Security of Payment Act 1999 of New South Wales

<sup>42</sup> The Building and Construction Industry Security of Payment Act 2004 and Rule 4 Building and Construction Industry Security of Payment Regulations of Singapore

<sup>43</sup> Section 5(2)(b) of the CIPA Act 2012

On the contrary, sections 14(4) and 15 of the New South Wales Act and section 23(2)(a) of the New Zealand Act specifies particularly that the failure of the non-paying party to serve a response or to pay by due date will enable the unpaid party to recover the sum claimed as a statutory debt. In the United Kingdom, a party to a construction contract may not withhold payment unless he has given an effective notice.<sup>44</sup>

In this respect, upon service of a payment claim pursuant to section 5 of the Act, the non-paying party has two options within ten working days;<sup>45</sup> either:

- (a) responding to it within the prescribed time<sup>46</sup> either denying the whole claim or admitting to part of it<sup>47</sup>; or
- (b) let the period lapse as a symbol of 'protest' to the entire payment claim under section 6(4).

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<sup>44</sup> Section 111(1) of the Housing Grant, Construction and Generation Act 1996

<sup>45</sup> Section 6 of the CIPAA Act 2012

<sup>46</sup> Section 6(3) of the CIPA Act 2012

<sup>47</sup> Section 6(2) of the CIPA Act 2012

	PARTICULARS	UNITED KINGDOM	NEW SOUTH WALES	NEW ZEALAND	SINGAPORE	MALAYSIA
Scope of dispute	All matters in a dispute under a construction contract, including non-payment issues	✓				
	Payment disputes only		✓	✓	✓	✓
Contract Nature	Must be in writing				✓	✓
	Oral or written	✓	✓	✓		
Construction Work definition	Inclusive of 'gas, oil and petrochemical'					✓
Time to Render Decision		28 days	10 days	20 days	14 days	45 days
Setting Aside of Adjudication Decision	The High Court may set aside					✓
	Review Procedure	✓	✓	✓	✓	
Retrospective effect						✓
Failure to Respond	Failure to respond will enable the unpaid party to recover the sum claimed	✓	✓	✓	✓	
	Deemed to have disputed the entire payment claim					✓

**Summary: Similarities and Differences in Statutory Adjudication in Other Jurisdictions**

In one perspective, section 6(4) could reduce any potential prejudice if the payment claim tendered by the unpaid party consists of considerable volume of information or just before a long holiday break in order for the other party not to have the time to properly deal with the claim given within the limited statutory time.<sup>48</sup>

However, in another perspective, by allowing such flexibility would defeat the main objective of the statute in ensuring prompt payment. The negative aspect of this provision is that it offers an avenue for a tactical gain to the non-paying party to choose not to disclose his justifications for non-payment until at adjudication response<sup>49</sup> stage, by which time the unpaid party would only have 5 working days to prepare and submit his adjudication reply.<sup>50</sup> Another negative aspect of section 6(4) is that it may also result in instances where the unpaid party will be forced to proceed with the adjudication to which he may not wish to refer in the first place if he had been informed of the grounds for withholding payment through a payment response. This is because, without a payment response, the unpaid party would not be in a position to assess the validity and legitimacy of the reason relied on by the non-paying party for withholding payment and determine whether he should proceed to the next stage by referring the payment dispute to adjudication.

### **1.1.3 Ambiguity in Section 6(4) as “Judgment in Default”?**

Prior to the High Court’s decision in *Bina Puri Construction Sdn Bhd v Hing Nyit Enterprise Sdn Bhd*,<sup>51</sup> *WRP Asia Pacific Sdn Bhd v NSBluescope Lysaght Malaysia Sdn Bhd*<sup>52</sup> and *ACFM Engineering & Construction Sdn Bhd v Esstar*

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<sup>48</sup> Bovis Lend Lease Ltd v The Trustees of the London Clinic [2009] EWHC 64 (TCC)

<sup>49</sup> Section 10 of the CIPA Act 2012

<sup>50</sup> Section 11 of the CIPA Act 2012

<sup>51</sup> [2015] MLJU 941

<sup>52</sup> [2015] MLJU 1125



***Vision Sdn Bhd & Another Case***<sup>53</sup> many are under the impression that if payment response is not filed, by virtue of section 6(4), the entire amount is deemed disputed. In this case, Bina Puri is disputing the interim claims made by Hing Nyit, alleging a gross miscalculation in one of the payment certificates. Hing Nyit therefore issued a payment claim against Bina Puri, who chooses not to respond due to the narrow interpretation of section 6(4) but subsequently filed an adjudication response.

The Court took the view that the jurisdiction of the adjudicator strictly under sections 5 and 6 of the CIPAA<sup>54</sup> and ruled in paragraph 11 of his judgment that “*the Adjudicator cannot be faulted for holding that he had no jurisdiction to decide the counterclaim of the applicant that was raised belatedly in the Adjudication Response*”.<sup>55</sup> The Court further determined that there can be no breach since the adjudicator has referred to the correct law.

As noted above, there are similarities in the adjudication process stage with pleadings under the Civil Procedure. In any litigation process, the plaintiff must serve statement of claim and the defendant is obligated to file memorandum of appearance within 14 days from the service of the claim. Failure to do so can lead a plaintiff to obtain a default judgment against the defendant, for instance if the defendant or his solicitors have failed or neglected to enter an appearance (default of appearance to writ)<sup>56</sup> or to file his defence (default of pleadings)<sup>57</sup> which similar to section 27 of CIPAA that strictly set out the adjudicator’s jurisdiction as limited to the matter referred pursuant to sections 5 and 6. It is important to bear in mind that since a default judgment is therefore not a judgment on the merits, hence, in an application to set aside a default

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<sup>53</sup> [2015] 1 LNS 756

<sup>54</sup> Section 27(1) of the CIPA Act 2012

<sup>55</sup> Ibid

<sup>56</sup> Order 13 of the Rules of the High Court 1980

<sup>57</sup> Order 19 of the Rules of the High Court 1980

judgment, the defendant must submit an affidavit with exhibit of the proposed statement of defence and adduce the relevant evidence to support his case.<sup>58</sup>

Unlike immediate relief by way of Judgment in Default due to non-appearance, section 6(4) is not recognised as a mechanism to avail the adjudication process. In a plain language, conclusion of such nature would negate the intention of Parliament to expedite payment for unpaid party. Nonetheless, if the matter at hand is complex and involves voluminous documents, would ten working days be adequate to produce suitable payment response?

Given that CIPAA have witnessed four similar issues of ‘payment response’ out of seven registered cases within the first twenty six months, it is vital for this research to identify the central issue and examine the provisions laid in section 6 of CIPAA. In brief, the salient terms highlighted in the said four cases are as follows:

CASES	SALIENT TERMS
Bina Puri Construction Sdn Bhd v Hing Nyit Enterprise Sdn Bhd <sup>59</sup>	Bina Puri contended in paragraph 11 that since Payment Response was not filed, the adjudicator does possess inherent jurisdiction to determine the counterclaim issue of RM13,544,690.45 since it is limited to the dispute raised under section 5 and 6, ie the Payment Claim and the Payment Response.
ACFM Engineering & Construction Sdn Bhd v Esstar Vision Sdn Bhd & Another Case <sup>60</sup>	The jurisdiction of the Adjudicator restricts to the matters found in sections 5 (Payment Claim) and 6 (Payment Response), not from the Adjudication Claim, Adjudication Response or even the Adjudication Reply.
WRP Asia Pacific Sdn Bhd v NSBluescope	The Court affirmed in paragraph 27 that the Adjudicator takes jurisdiction from the payment claim and the payment response; not

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<sup>58</sup> Fira Development Sdn Bhd v Goldwin Sdn Bhd [1989] 1 MLJ 40

<sup>59</sup> Ibid

<sup>60</sup> Ibid

Lysaght Malaysia Sdn Bhd <sup>61</sup>	from the adjudication claim, adjudication response or even the adjudication reply.
View Esteem Sdn Bhd v Bina Puri Holdings Bhd <sup>62</sup>	Paragraph 66 asserted that by virtue of subsection 27(1), the Payment Claim and the Payment Response is to adjudication what pleadings are to civil litigation. Parties are bound by their pleadings under the rules of procedure in civil litigation; in adjudication, those pleadings are to be found in the Payment Claim and the Payment Response; and not in the Adjudication Claim, Adjudication Response or the Adjudication Reply.

### Payment Response: Salient Terms of 4 CIPAA Cases

In one perspective, by exercising section 6(4), one is deemed to dispute the entire payment claim, indirectly protecting for non-paying party for not having a default judgment against him. On the other hand, in the absence of a payment response, the unpaid party is only obligated to prove any dispute pursuant to its payment claim without having to substantiate any issue in the payment response.<sup>63</sup>

In contrary to the three cases cited above, in the case of *View Esteem Sdn Bhd v Bina Puri Holdings Bhd*,<sup>64</sup> there was a payment response however three new additional matters was substantiated later at adjudication response stage. In line with the provisions in section 6(4) where the absence of payment response tantamount to disputing the entire claim, View Esteem therefore alleged its entitlement to rely on these three matters that would be raised for the first time at adjudication response stage. Although such submission was dismissed, it is fundamental to note that there are various underlying issues under the ambit of CIPAA payment response which needed an answer, such as:

- (i) Whether the court has given effect of Parliament's intention and purpose under section 6(4)?

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<sup>61</sup> Ibid

<sup>62</sup> [2015] MLJU 695

<sup>63</sup> Section 27 of the CIPA Act 2012

<sup>64</sup> Ibid

- (ii) Whether the deeming provision in CIPAA should be deleted to eliminate further ambiguity in future?

The cases decision in CIPAA in relation to payment response steers a middle path between those two extremes and it will be interesting to see how it develops in practice, possibly the effect that a non-paying party who failed to submit a payment response is not allowed to raise any cross-claims or set-off as a defence to the payment claim or perhaps section 6(4) of the CIPAA should be deleted to avoid further ambiguity.

Despite the undeniably success in the United Kingdom, the system of statutory adjudication has its problems, primarily because the decisions would give substantive affect and takes away or impairs a vested right acquired under existing laws by creating a new obligations. In this connection, although the powers of an adjudicator is wide, however the limited time imposed against the adjudication participant in CIPAA appears to be somewhat unbalance. The controversy of its feature of being a quick and hurried solution bringing to mind the saying that '*justice hurried is justice buried*'.

## **1.2 Problem Statement/ Research Issues**

It has been an eventful twenty six months since the enforcement of CIPAA and similar to any Acts in its infancy stages, significant developments and updates are constantly forthcoming. In this respect, failure to properly consider the mechanism accurately at an early stage can lead to severe problems if a dispute arises later. Despite

following the footsteps of the United Kingdom and other jurisdictions, Malaysian court has remarkably taken a distinct approach in the implementation of CIPAA.

Prior to CIPAA enforcement, Loon, L.W. and Loo, Ivan Y.F. (2013)<sup>65</sup> highlighted at page 104 that the non-paying party will not be precluded from challenging the payment claim in the adjudication proceeding even if he has failed to serve a payment response. The corollary to section 6(4) is that if the non-paying party does not serve a payment response and therefore the non-paying party is deemed to be disputing the entire payment claim. Contradictory to the conclusion made,<sup>66</sup> the predicament in the above cases has proven the interpretation of section 6(4) as rigid and failure to submit payment response may cause the later defence and/or counter-claim in the adjudication response to be estopped.

The flipside of this provision however, is that it provides a tactical advantage to the non-paying party by revealing his response towards the alleged claim only at later stage through adjudication response. It is pertinent to note that once adjudication response is served by the non-paying party, the unpaid party is entitled for short 5 working days only to prepare and submit his adjudication reply to the adjudication response.<sup>67</sup> Another negative aspect of section 6(4) is that it may force the unpaid party to continue the case despite the possibility of solution if the unpaid party is aware of the grounds to withhold payment through a payment response, which not only would save time, costs and resources of both disputing parties.

In an attempt to deliver a quick determination of a dispute, there is this understandable anxiety that careful analysis of evidence and facts may not be achieved

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<sup>65</sup> Loon, L.W. & Loo, Ivan Y.F. (2013). *Construction Adjudication in Malaysia*. Wolters Kluwer Business. CCH Asia Pte Limited

<sup>66</sup> Ibid

<sup>67</sup> Section 11 of the CIPA Act 2012

in an adjudication process. One reason for these problems is the short timescales and its suitability for more complex technical disputes, for instance in cases where parties demanded more time to present their case fully. On one hand, refusal to hear the entire dispute via adjudication response may tantamount to breach of natural justice.

Professor John Uff (2005)<sup>68</sup> commenting that one of the drawbacks of the HCGRA primarily as *'it may be that the draftsmen assumed that disputes would be tailored to fit the time limit but this has not happened. The result is that Statutory Adjudication is not suitable for all the disputes which are currently being referred, as revealed by the enforcement cases'*, being "one size fits all" style.<sup>69</sup> Thus, the possibility of unjust and erroneous decision is real.

This research would identify and elaborate extensively on the interpretation of 'payment response' particularly section 6(4). Due to lack of cases in Malaysia, the decided cases in other legislations in this respect will be scrutinised to ascertain the intention of the Parliament, including but not limited to detecting any loopholes in CIPAA clauses and best way forward.

### **1.3 Research Objective**

This research intended to identify the proper interpretation of section 6(4) of CIPAA.

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<sup>68</sup> Professor John Uff., (2005), UK: *100- Day Arbitration: Is the Construction Industry Ready For It?*, Keating Chambers

<sup>69</sup> Ibid

## **1.4 Scope of Research**

This research primarily will be focused on the interpretation of section 6(4) of CIPAA. In this respect, in depth study would be made to understand the application of payment response in other statutory adjudication jurisdictions, the intention of the Parliament and the principle of statutory interpretation, namely the literal, golden and mischief rule (known also as the purposive approach).

## **1.5 Significance of Research**

Given that section 27 has notoriously confined the jurisdiction of an adjudicator to sections 5 and 6 terms alone, therefore the ‘deeming provision’ obviously immaterial under the CIPAA purview. Significantly, this research shall highlight the repercussions taken by the Malaysian adjudicators in applying the approaches of other jurisdictions, despite the provision is not parallel with CIPAA ‘deeming provision’.

Analysis on relevant decisions of the courts of United Kingdom, New Zealand, Singapore and New South Wales, Australia would provide valuable point of reference as useful guidelines in approaching payment response and the possible problems in CIPAA provisions. With that, one would have better understanding on the limitations and implications of payment response, and subsequently ascertain the need to maintain section 6(4) of the CIPAA.

## **1.6 Research Methodology**

This research is founded by analytical approach based on the decided cases of statutory adjudication in various jurisdictions. A systematic method had been organised to ensure the predetermined objectives is achieved effectively. In this connection, the primary data for this research are clauses in the statutory adjudication as well as law cases related to statutory adjudication and payment disputes. By analysing these cases, possible problems may be discovered, chiefly to provide ideal guideline for future CIPAA to meet the expectation of the construction industry.

The secondary data comprises from analysis and researches done by others such as books, journals, articles, conferences, newspaper commentaries and internet reviews in relation to the CIPAA, as well as the position taken in other jurisdictions pursuant to the statutory adjudication. The objectives can be accomplished through case analysis which will provide a broad overview of the stand taken by the Malaysian in its application of adjudication in construction industry, implications and possible challenges of the implementation. In conclusion, all primary data and secondary data will be analysed in order to fulfill the objective of this research based on the following processes:-

### **1.6.1 First Stage: Initial Study**

Initial study has taken place prior to identifying of the research topic. In this regard, all inputs from lecturers, fellow colleagues and classmates has played significant role in determining the issues and hindrances of the research topic. Upon the conclusion of the research topic, the objective, scope and hypothesis of the research thereafter



summarised in view to formulate an orderly process. The ideas further obtained from the intensive reading of the books, journals, articles and law cases.

### **1.6.2 Second Stage: Collection and Recording Data**

Analysis from the judgment made in law cases in applying the statutory adjudication and comparing between the position taken by Malaysia and other jurisdictions. In this research, sources for literature review comprises from various sources.

Primary data is gathered largely from United Kingdom Law Journal, Malayan Law Journal, Singapore Law Report, Australian Law Report and Construction Law Report. It is collected primarily through the Lexis Legal Research for Academics, LexisNexis Legal Database as well as articles from Googlescholar. To accomplish the objective of this research, keywords such as ‘payment response’ and ‘adjudication decision’ are used to narrow down the scope of findings. Nevertheless, it must be noted that the actual number of relevant court cases are expected to be slightly more than this as some of the cases may not be retrieved from the database search engine of LexisNexis and some of it is yet to be officially reported.

In addition, the secondary source which was collected comprises of latest reading materials from Kuala Lumpur Regional Centre for Arbitration (KLRCA), including but not limited to books, newspaper articles, magazines, research paper executed by third parties and seminar papers. These sources are crucial to complement and complete the literature review chapter.

### **1.6.3 Third Stage: Data Analysis**

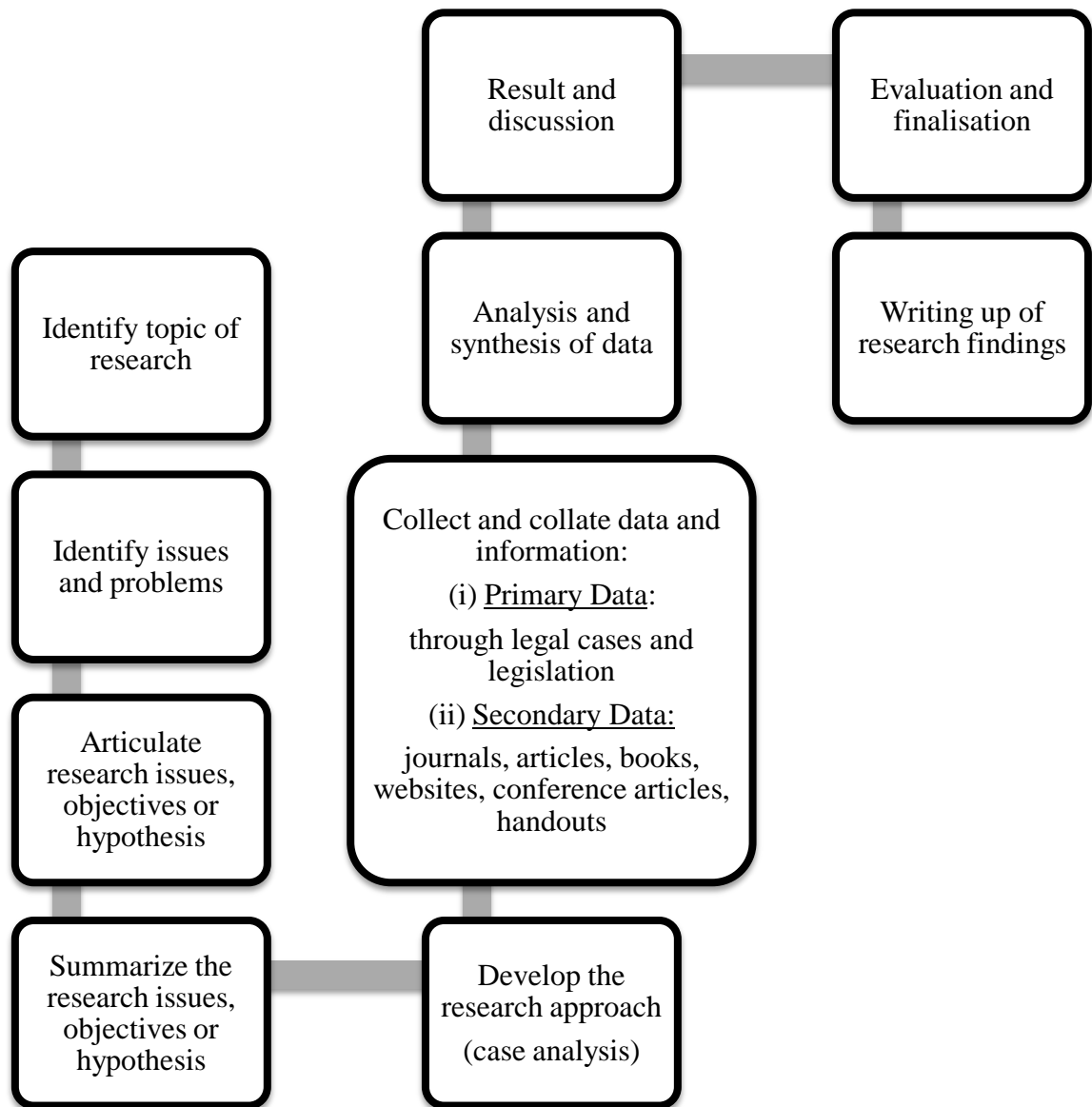
Once the related data is collected, all the collected cases, information, ideas, data and opinions will be analysed in order to attain the research findings of the case studies. Following by that, all the background of facts and the court's decision in other jurisdictions and the relevant cases are explained. The summary of legal cases will be prepared for easy understanding by the reader. Planning and organization of data is transmitted to streamline the process of writing of the paper in systematical order.

### **1.6.4 Fourth Stage: Writing-Up**

The fourth stage of the research is mostly involved the writing-up of the data by way of interpreting, analysing and structuring the research findings. The final stage of the process shall involve identifying any error to ensure the research objective has been achieved flawlessly. Conclusion and recommendations will be made in reliance on to the case analysis.

### 1.6.5 Fifth Stage: Conclusion and Recommendation

Lastly, the achievement of objectives will be identified. The findings of the study, recommendations and limitations of the study and the topics for further study will be presented. The flow of this research methodology is as follows:



**Research Methodology Flow**

## **1.7 Organization of Chapters**

This research consists of six chapters. Based on the research methodology, the following are the brief descriptions of each chapter:

- Chapter 1: This chapter presents the overview of the research. It introduces the background of the research, problem statement, objective, scope, significance of the research and method to achieve the objective.
- Chapter 2: This chapter reviews the terminology of payment response in Malaysia and other jurisdictions.
- Chapter 3: This chapter provides the research methodology of this research.
- Chapter 4 This chapter elaborates the significant of section 6(4) and identify the application of statutory Interpretation Acts 1948 and 1967 in order to clarify the ambiguity.
- Chapter 5: This chapter analyse any potential loopholes in the interpretation of CIPAA provisions
- Chapter 6: This chapter concludes the findings and recommendations on the related issues.

## 1.8 Conclusion

In this chapter, the background of this research has been adequately laid. As described above, under section 6(4), failure to respond to a payment claim shall be deemed as disputing the entire claim. Notably, this provision provides an avenue for a tactical advantage by submitting adjudication response instead of payment response, given the fact that the unpaid party would only have 5 working days to submit his adjudication reply.<sup>70</sup>

However the case decided under the ambit of CIPAA is in contrast with the provisions in section 6(4), wherein if the non-paying party failed to serve a payment response it cannot raise positive grounds of defence at the adjudication. Therefore, any reasons it has for refusing to pay the sum claimed must be set out in the payment response if it wishes to rely upon them at adjudication and if no payment response is served, no positive grounds can be raised.

As the intention of this research mainly to determine the significant ambiguity in CIPAA provisions, therefore, the cases pertaining to statutory adjudication in other jurisdictions will be instructive for our courts as source of reference. In summary, one could not help but notice that Malaysia has taken rather unique and peculiar approach since its enforcement. Notwithstanding the variances in the methods of challenging or resisting the enforcement of an adjudication decision, there is common consensus to provide speedy mechanism for settling disputes in construction industry under the statutory adjudication purview. This research will be focused on the terminology of payment response and further recommend the best way moving forward to ensure the effectiveness of CIPAA in operation.

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<sup>70</sup> Section 11 of the CIPA Act 2012

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